IN THE

Supreme Court of the United States

October Term, 1976
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside California, Department of Weights and Measures,
Petitioner,

vs.

THE RATH PACKING COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF AFFIRMANCE IN THE RATH CASE

EDWIN H. PEWETT
JAMES M. KEFAUVER

GLASSIE, PEWETT, BEEBE & SHANKS
1819 H Street, N.W.
Washington, D.C. 20006

Counsel for The National Independent Meat Packers Association, Amicus Curiae

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

SUBJECT INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1976
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside California, Department of Weights and Measures,
Petitioner.

vs.

THE RATH PACKING COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF AFFIRMANCE IN THE RATH CASE

The National Independent Meat Packers Association ("NIMPA")[1] respectfully submits this brief as *amicus*

[1] NIMPA has filed with the Clerk of this Court the respective consents of petitioner and respondent to NIMPA's filing of the instant brief *amicus curiae*. In addition, with the consent of the respective parties, the following state or regional trade associations join with NIMPA in its support of respondent Rath: the Greater New York Association of Meat and Poultry Dealers, the Kentucky Meat Processors Association, the Meat Trade Institute (New York), the New England Wholesale Meat Dealers Association, and the Pennsylvania Meat Packers Association. The respective memberships of these associations are comprised in whole or primarily of concerns operating establishments subject to federal inspection.

curiae urging affirmance of the judgment of the Court of Appeals for the Ninth Circuit entered in *Jones* v. *Rath* on October 29, 1975.[2]

QUESTION PRESENTED

The specific question presented in the *Rath* case is whether the application by the State of California to meat products prepared in an establishment under inspection by the United States Secretary of Agriculture pursuant to the federal Wholesome Meat Act of 1967 (21 U.S.C. §601 *et seq.*. hereinafter "the Meat Act") of certain state requirements (hereinafter specified) with respect to the labeling of the net weight of meat products constitute the imposition of state labeling requirements "in addition to, or different than" the federal requirements in contravention of 21 U.S.C. §678. This question therefore is one of preemption bottomed in Article VI, Clause 2 of the Constitution of the United States.

INTEREST OF NIMPA AS AMICUS

NIMPA is a trade association, organized and existing as a non-profit corporation under the laws of the District of Columbia. NIMPA's membership is composed of approximately 275 concerns engaged in the slaughter of animals and the preparation of meat products for human consumption. Most of NIMPA's members prepare meat products for distribution in interstate commerce. Many members of NIMPA, like respondent Rath, prepare for shipment in interstate commerce bacon and other products which are subject to what is known in the industry as "shrink", that is, the loss of moisture (and therefore weight) due to evaporation.

---

[2] The instant brief does not treat the opinion of the Court of Appeals for the Ninth Circuit in Jones v. General Mills inasmuch as that case does not concern meat products.

The premises, facilities and operations of the NIMPA member concerns which prepare meat products for distribution in interstate commerce[3] are subject to inspection by the Secretary of Agriculture (hereinafter "the Secretary") to assure that such products are not "adulterated" as that term is defined in the Meat Act. 21 U.S.C. §601(m). These concerns are also subject to the regulatory authority vested in the Secretary by the Meat Act to assure that meat products prepared under federal inspection are not "misbranded" as that term is defined in the Meat Act. 21 U.S.C. §601(n). The basic proscription of the Meat Act is the sale, transportation, or offer for sale or transportation, of meat products which are adulterated or misbranded, or which have not been inspected and passed when so required. 21 U.S.C. §610(b).

A meat product is deemed "misbranded" under the Meat Act *inter alia:*

> [I]f in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) *an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, That under clause (B) of this subparagraph (5), reasonable variations may be permitted,* and exemptions as to small packages may be established, *by regulations prescribed by the Secretary.* [21 U.S.C. §601(n)(5); emphasis added.]

---

[3] The membership of NIMPA also includes packing concerns which prepare meat products solely for distribution in *intrastate* commerce but which operate establishments in so-called "designated states". A designated state is one in which the Secretary has taken over meat inspection activities as a result of a finding by the Secretary that the state has not developed or is not enforcing "requirements at least equal to" the federal requirements. 21 U.S.C. §661(c)(1).

This labeling requirement, which is but one of twelve specific requirements set forth in §601(n), is the labeling requirement at issue here.

Congress has enunciated a comprehensive set of labeling requirements and has vested paramount regulatory authority in the Secretary under the Meat Act on the subject of labeling. Pursuant to that authority, the Secretary has promulgated a regulation which states that " . . . no label shall be used on any product until it has been approved in its final form by the Administrator [of the Animal and Plant Health Inspection Service of the Department of Agriculture]." 9 C.F.R. §317.4. Thus, in order for a label to be approved prior to its use, or for it to continue in use, representatives of the Secretary must make a determination that it will not cause the product to which it is affixed to be misbranded under any subpart of 21 U.S.C. §601(n). The Secretary's authority not only reaches labeling after the fact but in its incipiency.

In view of the all-pervasive federal regulatory scheme embodied in the Meat Act, packers subject to regulation by the Secretary should be able to rely on the necessary underlying determinations of the Secretary's representatives that the labels accurately represent the contents (both weight and composition) of packages to which such labels are affixed. That the exercise of independent authority by the states in the area of labeling of meat products once they are outside a federally inspected establishment would subject federally inspected packers to a crazy-quilt of state labeling requirements is readily apparent. If such authority lawfully could be exercised by the states, packers which ship their products in interstate commerce would be faced with the impossible task of adhering to the federal labeling requirements, as well as those of each state into which their products are shipped, no matter how different one state's requirements might be from the federal requirements, or from another state's requirements. But Congress wisely

sought to foreclose this inevitable burden on commerce by incorporating into §408 of the Meat Act (21 U.S.C. §678, hereinafter "§678") an express prohibition against the imposition by any state of "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than," those made under the Meat Act.

If the position of the State of California in this case were to be sustained by this Court, federally inspected packers would not be subject to the labeling requirements of a single master — Congress and the Secretary acting pursuant to the Meat Act — but to fifty other masters — the state legislatures and state officials acting pursuant to their respective statutes or regulations. Moreover, while this case arose in the context of the labeling of the net weight of a particular meat product (bacon), we perceive no distinction between the multitude of other aspects of labeling which could cause a meat product to be misbranded under §601(n). In short, if, as it urges here, the State of California has the authority to implement its own standards for testing the accuracy of statements of net weight on labels of products manufactured in federally inspected establishments and can ignore the federal standards therefor, it likewise would have the authority to set its own standards for determining, *notwithstanding a prior contrary determination by the Secretary*, that a meat product is "misbranded" in some other respect, *e.g.*, that its "labeling is false or misleading" in some particular (§601(n)(1)); that it has been "offered for sale under the name of another food" (§601(n)(2)); that it is "an imitation of another food . . ." (§601(n)(3)); and so forth.

In sum, NIMPA believes that the very ability of federally inspected packers to continue to operate in interstate commerce without patently impermissible and destructive interference by the states is at stake in this case. For the State of California has attempted to read §678 out of the United States Code, and thereby to substitute itself—and by direct

implication each other state—for Congress (and the Secretary) as the ultimate authority in matters relating to the labeling of meat products prepared in federally-inspected establishments.

STATEMENT OF THE CASE

NIMPA concurs in, and accordingly incorporates herein by reference, the detailed statement of the case of respondent Rath. Suffice it to say, by way of summary, that in 1971 agents of petitioner, the director of the County of Riverside Department of Weights and Measures, ordered "off sale" quantities of packaged bacon produced and labeled by Rath in a federally inspected establishment. In so doing, petitioner's agents were acting pursuant to California Business and Professions Code, §12211 (hereinafter "§12211") which authorizes such off sale orders "Whenever a lot or package of any commodity is found to contain, through procedures authorized herein, a less amount than represented". The procedures used to determine whether the packages of Rath's bacon contained a less amount than represented are set forth in 4 California Administrative Code, Chap. 8, Subchap. 2, Art. 5 (hereinafter "Article 5").

Rath instituted in the District Court an action to enjoin this conduct of petitioner on the ground that it constituted the imposition of state labeling requirements which were in addition to, or different than those imposed by the Meat Act in contravention of the preemption provision thereof (§678). The District Court granted the injunction sought by Rath against petitioner and also against M.H. Becker, the Director of the County of Los Angeles Department of Weights and Measures, and C.B. Christensen, the Director of Agriculture of the State of California. (Rath had instituted a separate action against Becker, in which Christensen had intervened, which action was tried and subsequently con-

solidated for decision with Rath's action against petitioner Jones.)

The Court of Appeals for the Ninth Circuit affirmed the District Court's grant of injunctive relief to Rath, the propriety of which was the sole issue presented by Jones' petition for writ of certiorari.

ARGUMENT

I. CONGRESS HAS PREEMPTED AND PRECLUDED CALIFORNIA (AND ANY OTHER STATE) FROM IMPOSING LABELING REQUIREMENTS THAT ARE "IN ADDITION TO, OR DIFFERENT THAN" THE REQUIREMENTS IMPOSED BY THE FEDERAL WHOLESOME MEAT ACT.

A. Federal Preemption Is Clearly Established In 21 U.S.C. §678

The bedrock of the doctrine of federal preemption is Article VI, Clause 2, of the United States Constitution, which states in pertinent part that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, under the Authority of the United States, shall be the supreme Law of the Land . . . ." In construing Clause 2 in a case such as the instant one, which involves a conflict between federal and state statutes, the guiding principle is that:

> [F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. [*Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142, *rehear. denied*, 374 U.S. 858 (1963).]

Thus, although the nature of the subject matter regulated — meat products prepared and labeled under federal in-

spection — permits no conclusion other than one of federal preemption, it is not necessary here to reach that conclusion by inference. For Congress in 21 U.S.C. §678[4] ordained its will as to the proper role of the states with respect to the labeling of meat products prepared under federal inspection.

Because §678 in our view is dispositive of this case, we quote it in its entirety:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter 1 of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. *Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter 1 of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter 1, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment,* or, in the case of imported articles which are not at such an establishment, after their entry into the

[4] Pub. L. 90-201, §16, 81 Stat. 600.

> United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter. [emphasis added].

Under §678 the states, although expressly precluded from imposing labeling requirements which are in addition to, or different than, the federal labeling requirements, are permitted to *enforce* the *same* requirements (*i.e.*, the federal requirements) with respect to federally inspected products outside federally inspected establishments, so long as such enforcement is *consistent* with the requirements of the Meat Act and the Secretary of Agriculture's enforcement thereof. Thus, the word "consistent", in the second sentence of §678, establishes the standard applicable to the states' *exercise* of concurrent jurisdiction, while the not "in addition to, or different than" standard refers to the substantive requirements themselves.[5]

Congress unquestionably was well-aware that, in order to avoid chaos in the distribution of products prepared under federal inspection and to promote uniformity in labeling, it would not be sufficient merely to make the states' substantive labeling requirements conform to the federal requirements; the states' *application* of those requirements must also conform to (*i.e.*, be consistent with) the federal

[5] The preemptive language of §678 reflects the special concern on the part of Congress with respect to marking, labeling, packaging, or ingredient requirements, as opposed to the "other matters regulated under this chapter" referred to in the last sentence of §678. As to such "other matters", the states' actions are limited only to the extent of being "consistent" with the federal requirements. As to marking, labeling, packaging, or ingredient requirements, however, a two-pronged restriction is placed on the states: (1) the states' substantive labeling requirements may not be in addition to, or different than, the federal requirements; and (2) the states' *exercise* of concurrent enforcement jurisdiction as to these matters must be consistent with the federal requirements and federal enforcement thereof.

application thereof. The consistency restriction on the states' authority, as a supplement to the "... addition to, or different than" restriction, therefore was intended to make clear federal ascendancy in matters of interpretation and application, even where a state's labeling requirements, as embodied in statute or regulations, are the same as the requirements specified in the Meat Act or in regulations promulgated thereunder.[6] In this connection, the court in *Iowa Beef Processors* v. *Carbaugh*, Civil Action No. 608-74A (E.D. Va., November 27, 1974) enjoined the Commissioner of the Department of Agriculture and Commerce of the Commonwealth of Virginia from interferring with the marketing of a product bearing a federally approved label. In that case, the Commissioner was attempting to enforce a Virginia labeling requirement (1A Va. Code, §3.1-884.18(16)(g)) which was *identical* to 21 U.S.C. §601(n)(7), but pursuant to an interpretation of that requirement different from the Secretary's.[7]

Given the Congressionally mandated restrictions on the regulatory authority of the states with regard to the labeling of meat products prepared in federally inspected establishments set forth in §678, we now focus on the term

[6] Subsequent to the enactiment of the Meat Act in 1967, many states adopted in their respective meat or food statutes the Meat Act's definition of "misbranded". See 2 Ala. Code Tit. 2, §401(53) (1951), *as amended* (1969); 8 Ariz. Rev. Stat., §24-601 (1956), *as amended* (1968); 7 Idaho Code Ann., §37-1901 (1961), *as amended* (1969); Ill. Ann. Stat., Ch. 56 1/2, §302.20 (1959), *as amended* (1969); Ind. Stat. Ann., Tit. 16, Art. 16-6-5-3 (1967), *as amended* (1969); 10A Iowa Code Ann., §189A.2 (1966), *as amended* (1969); 5 Kan. Stat. Ann., §65-6a-18 (1964), *as amended* (1969); Md. Code Ann., AG §4-101(p) (1974); 3A N.C. Gen. Stat., Art. 49B, §106-549.15 (1969); 1 Okla. Stat., Tit. 2, §6-181 (1968); 12 S.D. Com. Laws, §39-5-26 (1968); 12B Tex. Rev. Civ. Stat., Tit. 71, Art. 4476-7, §1(k) (1969); 1A Va. Code §3.1-884.18 (1970); 1 Wash. Rev. Code, §16.49A.170 (1969).

[7] The Findings of Fact and Conclusions of Law in this case, which are unreported, are set forth in the Supplemental Appendix attached hereto.

"misbranded" as used in that section. This term is defined in 21 U.S.C. §601(n) and the terms "label" and "labeling" are defined in §601(o) and §601(p), respectively.

Labeling is plainly the touchstone of the term "misbranded" as defined in the Meat Act. Each of the twelve subparts of §601(n) (except subpart (4)) refers expressly or by clear implication to a "label" or to "labeling". Thus, to determine whether a meat product is "misbranded" under the Meat Act, it is necessary to compare the statements on its label to the contents of the container to which the label is affixed. In short, labeling requirements are part and parcel of the concept of "misbranded". And, §678 makes it clear that if the Secretary should deem a product not misbranded, the states may not deem it misbranded, either by way of imposing a labeling requirement which is in addition to, or different than, the requirements under the Meat Act, or by way of *applying* the requirements of the Meat Act in a manner inconsistent with the Secretary's application thereof.

With respect to the relationship between the terms "labeling" and "misbranded", petitioner asserts that:

> If, as indicated by the Ninth Circuit (Pet. App. 28 and 45), there is no substantial difference between "labeling", as used in the first part of section 678, and "misbranding", then the provisions of section 678 which speak of "articles which are adulterated and misbranded" are indeed redundant. Congress must not however be presumed to have performed an idle act in delineating the respective jurisdictional areas of the State and federal governments. [Pet. Br. 37, n. 29].

This assertion not only misstates the Ninth Circuit's opinion, but tortures the plain meaning of §678 beyond recognition. First, the Ninth Circuit simply did *not* indicate that there was no substantial difference between "labeling", as used in the first part of §678, and "misbran-

ding". What the Ninth Circuit did observe—and quite correctly—was that "We see no difference in substance between 'misbranding' and *'mislabeling'* in this case." (Jones Pet. App. 45, 5 0F.2d at 1 24, n. ; emphasis added). Second, as noted above, "labeling" is part and parcel of the definition of "misbranding" under the Meat Act. In short, contrary to petitioner's assertion, "misbranding" does not have a statutory or conceptual existence apart from "labeling", as to which even petitioner is willing to admit that he is precluded from imposing requirements in addition to, or different than, the federal requirements.

Petitioner also attempts to obviate the preemptive language of §678 by contending that:

> Assuming again *arguendo* that there is federal preemption as to labeling in section 678, such preemption has little meaning in the case at bar. Labeling is a matter of format, not of substance behind the label. Jones has not imposed any labeling requirements. [Pet. Br. 40].

For petitioner to argue that "labeling" as used in §678 is a matter of format, but not of substance, is to ignore the definition of that term, as well as the definition of "misbranded" in the Meat Act. The statutory definition of "labeling" (§601(p)) makes no reference to "format", but encompasses "labels and other written, printed, or graphic matter" on a product or its container. More important, as noted above, the definition of "misbranded" makes repeated references to labeling as the means by which *substantive* information about the product (identity, ingredients, weight, etc.) is to be conveyed to purchasers. Accordingly, if labeling relates only to format, the statutory definition of "misbranded" would be meaningless. Finally, petitioner's assertion that he "has not imposed any labeling requirements" is disingenuous at best.[8] For a labeling

[8] In rejecting this argument, the Ninth Circuit generously characterized it as "strained". (Jones Pet. App. 28; 530 F2d. at 1314, n. 25).

requirement of petitioner — that statements of net weight on labels on the packages of Rath's bacon must comply with *California's* requirements — is precisely what this case is all about.

In sum, as the Ninth Circuit correctly held:

> This language [§678] clearly shows the intent of Congress to create a uniform national labeling standard, under definitions set forth in the Wholesome Meat Act, including the definition of "misbranding" in §601(n). The express language of §678 implements this clear Congressional intent. [Jones Pet. App. 27-28, 530 F.2d at 1313-14].

B. The Legislative History Pertaining To Section 678 Fully Comports With the Express Language Thereof

As demonstrated above, the Congressional intent to preempt independent state regulation of the labeling of meat products prepared under federal inspection appears so clearly in the language of §678 that any reference to the legislative history pertaining to that section is unnecessary. "[W]hen the wording of an Act is plain and unambiguous, there is neither necessity nor justification for resort to legislative history to interpret its meaning." *Ohio Power Co.* v. *N.L.R.B.*, 176 F.2d 385, 387 (6th Cir. 1949) citing numerous decisions of this Court.

Nonetheless, reference here to the legislative history of the Meat Act, insofar as it relates to §678, is useful to underscore the clarity with which Congress expressed its intent in §678. The section-by-section analysis in H.R. Rep. No. 653, 90th Cong., 1st Sess., 27-28 (1967), states:

> Section 408 [codified in 21 U.S.C. §678] would *exclude States*, territories, and the District of Columbia from regulating operations at plants inspected under title I

or *from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the act,* but would permit them to impose recordkeeping and related requirements with respect to such plants if consistent with the Federal requirements and to impose requirements consistent with the Federal provisions as to other matters regulated under the act. [emphasis added].

The identical statement appears in S. Rep. 799, 90th Cong., 1st Sess., 2 1967 U.S. Code Cong. and Admin. News 2207, which accompanied S. 2147, a companion bill to H.R. 12144 which was enacted into law. Similarly, H.R. Rep. No. 653, at 7 states that:

Title IV contains auxiliary provisions to further implement the new "Federal Meat Inspection Act" and would:

* * *

(7) Provide for separation of authority between State and Federal Governments regarding the inspection of meat and meat products. States would be prohibited from regulating federally inspected plants whose operations are governed by title I. Any recordkeeping and related requirements proposed by States for federally inspected plants must be in conformance with the Federal Meat Inspection Act. *States could not impose marking, labeling, packaging, or ingredient requirements in addition to or different from Federal requirements for products prepared under Federal inspection.* [emphasis added].

Thus, the preemptive language of §678 is so clear and self-explanatory that the references to it in the legislative history of the Meat Act are couched in virtually the same language as the statutory provision itself.

It should also be noted at this juncture that, within one year of the enactment of the Meat Act, Congress enacted amendments to the Poultry Inspection Act, which amendments included the addition thereto of a preemption provision (21 U.S.C. §467e)[9] which tracked the language of the Meat Act. The only difference in substance between the respective preemption provisions in the Meat Act and the amended Poultry Inspection Act is that the latter precludes the states from imposing "storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce", as well as from imposing "[m]arking, labeling, packaging, or ingredient requirements . . . in addition to, or different than," the federal requirements. Thus, in the 1968 amendments to the Poultry Inspection Act, Congress not only extended to the regulation of poultry products the same preemption scheme theretofore accomplished with respect to the regulation of meat products, but also added storage and handling requirements to the specific subjects with respect to which state regulation was to be limited.

C. The Regulatory Scheme Embodied In The Meat Act As A Whole Contradicts Petitioner's Assertion That Congress Intended To Preserve The States' Police Power On The Subject Of Labeling Of Meat Products.

Although this Court need not go beyond the four corners of §678 to affirm the lower courts' finding of preemption in this case, an examination of the thrust of the Meat Act as a whole discloses a Congressional intent to impose federal supervision over, and indeed in certain circumstances total take-over of, state police powers on the subject of meat

---

[9] Pub. L. 90-492, §17, August 18, 1968, 82 Stat. 807. In H.R. Rep. No. 1333, 90th Cong., 2nd Sess., 3 1968 U.S. Code Cong. and Admin. News 3434, it is stated that "The decision was made to adhere, insofar as the subject matter permitted, as closely to the newly enacted meat legislation as possible."

products. This plainly-expressed intent of Congress belies petitioner's contention that the Meat Act was intended to be "protective" of state police powers (Pet. Br. 34).

Section 301 of the Meat Act, 21 U.S.C. §661, provides that:

> (a) It is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts of State and other Government agencies to accomplish this objective . . .
>
> * * *
>
> (c) (1) *If the Secretary has reason to believe,* by thirty days prior to the expiration of two years after enactment of the Wholesome Meat Act, *that a State has failed to develop or is not enforcing, with respect to all establishments within its jurisdiction* (except those that would be exempt from Federal inspection under subparagraph (2)) *at which cattle, sheep, swine, goats, or equines are slaughtered, or their carcasses, or parts or products thereof, are prepared for use as human food, solely for distribution within such State, and the products thereof, are prepared for use as human food, solely for distribution within such State, and the products of such establishments, requirements at least equal to those imposed under subchapter I and IV of this chapter, he shall promptly notify the Governor of the State of this fact.* If the Secretary determines, after consultation with the Governor of the State, or representative selected by him, that such

> requirements have not been developed and activated, he shall promptly after the expiration of such two-year period designate such State as one in which the provisions of subchapters I and IV of this chapter shall apply to operations and transactions wholly within such State . . . . [emphasis added].

Further, Section 661(c) (1) authorizes the Secretary, in certain circumstances, to designate a particular establishment distributing meat product soley within a state as subject to federal inspection "as though engaged in commerce".[10] The extension of federal regulatory authority to meat packing concerns operating solely in intrastate commerce is bottomed in 21 U.S.C. §602, wherein it is stated that:

> It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce . . . .[11]

The regulatory scheme established by the Meat Act was clearly the response of Congress to inadequate state exercise of police power. While the legislative history of the

---

[10] Other key provisions of §661 authorize the Secretary to cooperate with state agencies in developing and administering state inspection programs in states which have enacted a state meat inspection law that imposes inspection requirements "at least equal to the federal requirements with respect to the slaughter of animals and the preparation of meat products for use as human food" solely for distribution within such state (§661(a) (1)); and to furnish financial aid to states in the development and administration of such state programs (§661(a) (3).

[11] The use of the terms "misbranded" and "mislabeled" as interchangeable terms elsewhere in §602 also serves to refute petitioner's arguments that California's regulatory activities at issue here do not concern "labeling" (or mislabeling) but only "misbranding".

Meat Act is replete with statements to this effect, the point was made bluntly by the House Committee on Agriculture: "The committee feels that a definite need exists to improve State inspection programs". H.R. Rep. 653, 90th Cong., 1st Sess. 5 (1967).[12] To be sure, the states' police power over meat products prepared and distributed solely in *intrastate* commerce was theoretically left intact in the sense that Congress did not in one fell swoop displace that power. But Congress did subject the states' exercise of that power to the scrutiny of the Secretary and provide for federal takeover of that function in states whose regulatory requirements were not at least equal to the federal requirements.

In this regard, Dr. F. J. Mulhern, Administrator of the Animal and Plant Health Inspection Service of the Department of Agriculture, in testimony before the Subcommittee on Agriculture of the House Committee on Appropriations on February 26, 1976, stated that:

> With California, 17 states have yielded their meat inspection program to us. There is no incentive for them to stay in, because the State legislature can give up the expense and have Uncle Sam come in and take over. [Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong., 2nd Sess. (Part 3) 591 (1976).]

---

[12] It is curious indeed that petitioner would argue that "the framers of the Wholesome Meat Act intended to preserve the responsibilities and functions of the States" (Pet. Br. 43) and, in the same breath, rely on Representative Feighnan's statement made prior to the enactment of the Meat Act, that "A current Department of Agriculture survey of packing and processing facilities in *non-Federal inspected meat plants* shows the existence of appalling conditions." (Pet. Br. 42, n. 34; emphasis added). Would petitioner have this Court believe that this statement was anything other than a condemnation of the states' exercise of their responsibilities and functions, which, petitioner now tells us, Congress intended to preserve?

Thus, California, as of April 1, 1976 (Id. at 588) surrendered to the Secretary its police power in the area of inspecting meat products prepared in California for distribution solely in California, which inspection of course covered labeling. To the extent that petitioner now seeks to justify his enforcement activities with respect to Rath's bacon (which he undertook in 1971 and which he presumably would undertake in the future should this Court reverse) by emphasizing California's *present* interest in exercising its police power over meat products, such justification simply cannot be reconciled with California's intentional withdrawal from the field of meat inspection.

Further, petitioner's suggestion that, if this Court were to affirm the Ninth Circuit's finding of federal preemption here as to the labeling of meat products prepared under federal inspection it would somehow do violence to a historical function of the states, is fatuous. The fact of the matter is that federal regulation of the labeling of meat products, such as Rath's bacon, distrbuted in interstate commerce is not of recent vintage. For as noted in S. Rep. 799, 2 1967 U.S. Code Cong. and Admin. News 2198: "Extensive control has been exercised for many years under regulations adopted pursuant to the Meat Inspection Act [of 1907] and related laws over the marking, labeling, and packaging of products at federally inspected meat packing establishments." In view of this historical reality, §678 of the Meat Act merely provided an express statutory basis for federal preemption in the area of labeling, which preemption had already been effected as a practical matter.

Finally, in his effort to obviate §678 and the overall thrust of the regulatory scheme embodied in the Meat Act, petitioner asserts that there is little federal weights and measures inspection and even less enforcement (Pet. Br. 7). As far as meat products prepared under federal inspection are concerned, this simply is not so. In meat packing plants subject to federal inspection, such as Rath's, inspection is

required during all periods of operation.[13] Meat products cannot lawfully be shipped in interstate commerce unless first inspected and passed by the Secretary, just as labels on such products cannot be used until approved by the Secretary. The inspection by the Secretary, as shown by the record here (R.T. 53), includes inspection of the accuracy of statements of net weight. Thus, for petitioner even to imply that his actions with respect to Rath's bacon at issue here were necessary because of deficiencies in federal meat inspection in any respect is an utter distortion of fact.

In sum, petitioner's argument that there is no federal preemption of state regulation of the labeling of meat products prepared in federally inspected establishments are without merit, for to find any merit in those arguments effectively would erase §678 from the books. We now turn to the questions whether petitioner has imposed labeling requirements in addition to, or different than, the federal requirements and whether petitioner's actions here were pursuant to California's exercise of concurrent jurisdiction consistent with the federal labeling requirements.

II. CALIFORNIA'S LABELING REQUIREMENTS INVOLVED HERE ARE PREEMPTED BY SECTION 678 AND THEREFORE PETITIONER'S ENFORCEMENT THEREOF AS TO RATH'S BACON WAS PROPERLY ENJOINED.

A California's Labeling Requirements Imposed By Petitioner On Rath's Bacon Are "In Addition To, Or Different Than," The Federal Requirements.

That California's labeling requirements applied by petitioner to Rath's bacon are in addition to, or different than, the federal requirements is manifest from the face of the respective California and federal requirements. As

[13] The Secretary is *required* to inspect slaughter and processing operations in federally inspected establishments "during the nighttime as well as during the daytime." 21 U.S.C. §609.

noted above, the *statutory* federal labeling requirement applicable here is §601(n) (5). The "reasonable variations" between stated weight and actual weight referred to in §601(n) (5) have been prescribed by the Secretary in 9 C.F.R. §317.2(h) (2). This regulation provides in pertinent part that:

> Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

Thus, under the federal labeling requirements, a meat product is *not* deemed to be "misbranded" unless particular variations between the stated weight and actual weight (a) were caused by something other than a loss (or gain) of moisture and, if caused by a loss (or gain) of moisture, it occured other than during good distribution practices; or (b) were caused by something other than unavoidable deviations from good manufacturing practice; and (c) such variations so caused were not unreasonably large. It should be noted that this adminstrative refinement of the term "misbranded" applies to meat product after it has left a federally inspected establishment (*i.e.*, during the course of distribution), thus making it clear, as does §678 itself, that the *federal* labeling requirements are applicable to meat products throughout the chain of distribution, including the point of retail sale. And it is also clear that 9 C.F.R. §317.2(h) (2) is a "labeling requirement" within the meaning of §678 inasmuch as a regulation, called for by the regulatory statute itself (by §601(n) (5) here), has the force of law. *United States v. Mersky*, 361 U.S. 431, 437-438 (1960); *Atchison, Topeka and Santa Fe Railway Company* v. *Scarlett*, 300 U.S. 471, 474 (1937).

The substantive labeling requirement which petitioner applied to Rath's bacon (§12211) provides in pertinent part that: "Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale . . ." In order for this Court to conclude, as did the lower courts, that petitioner was imposing on Rath's bacon a labeling requirement *different than* the federal requirement nothing more than a comparison of §601(n) (5) of the Meat Act and §12211 is needed. In the first place, petitioner was not applying, as demanded by §678, the precise labeling requirement incorporated in the definition of misbranded set forth in §601(n) (5). Nor was he applying a labeling requirement which *in substance* was the same as the federal requirement. For §12211 makes no reference whatever to "reasonable variations" as does §601(n)(5), and affords no recognition to such variations in the circumstances specified in 9 C.F.R. §317.2(h) (2). As aptly observed by the District Court, petitioner does "not, in any sense of the word, pretend to be applying federal statutory standards" (Jones Pet. App. 67, 357 F. Supp. at 535).

Petitioner of course seeks to justify his enforcement actions at issue here by asserting that the weight testing procedure underlying his off sale orders pursuant to §12211 does permit reasonable variations between stated weight and actual weight. That procedure (set forth in Article 5, §2933.3 of the California regulations), as noted by the Court of Appeals, involves a twelve-step method, as follows:

> (1) determine the number of packages in the lot to be sampled;
>
> (2) from a table in the regulation, determine the total package sample size (e.g., 15 packages out of a lot of 300);
>
> (3) from the same table, determine the tare sample size (e.g., 2 packages out of a lot of 300);

> (4) record the gross weight of each tare sample package;
>
> (5) remove the usable contents from each tare sample, weigh the used, empty container, and compute the average rate weight;
>
> (6) weigh the remaining packages in the package sample and record their weights, determining the amount of error from labeled weight for each package;
>
> (7) [not applicable to bacon];
>
> (8) calculate the preliminary total error for the sample, and determine the arithmetical average error;
>
> (9) calculate the range of error for each sub-group of the package sample;
>
> (10) determine whether any unreasonable errors exist, and eliminate from further computations all samples whose errors exceed the preliminary average error in underweight situations by more than the amounts set forth in tables in the regulations; if the number of unreasonable errors exceeds a certain set figure for each sample size, further action, including the issuance off-sale orders, may be undertaken;
>
> (11) recalculate the total and average error of the sample excluding the unreasonable errors;
>
> (12) "(a) If the total error as obtained from the sample is plus and is less than the value shown in Table III for the corresponding range and sample size, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.
>
> "(b) If the total error obtained from the sample is less than the above-determined value, and the error is

minus, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following secions shall govern the disposition of the lot."

Like §12211, Article 5 makes no reference to "reasonable variations" and, moreover, does not incorporate the specific recognition of moisture loss during good distribution practices as required by 9 C.F.R. §317.2(h) (2).[14] Nor, as shown at the trial of Rath's action against Becker (petitioner's counterpart in Los Angeles County), do the county departments, as a practical matter recognize variations in net weght which result from moisture loss during good distribution practice (Jones Pet. App. 6, 530 F.2d at 1300).

It is thus inescapable that petitioner, in ordering Rath's bacon off sale, was not applying the federal definition of "misbranded", either pursuant to a California statute, a California regulation, or as a matter of practice. Petitioner therefore was imposing on Rath's bacon a state labeling requirement different than the federal labeling requirement and, for this reason the District Court enjoined petitioner's enforcement actions as to Rath's bacon and the Court of Appeals affirmed.

[14] Likewise, petitioner's reliance on Handbook 67 of the National Bureau of Standards (Br. 22-26) is misplaced. The statistical testing methods set forth therein, with which Article 5 in fact does not conform, are not material to petitioner's enforcement actions as to Rath's bacon inasmuch as those actions were taken pursuant to California's substantive labeling requirements which are different from §601(n) (5) and 9 C.F.R. §317.2(h) (2).

B. Petitioner's Purported Exercise Of Concurrent Jurisdiction Under §678 Was Inconsistent With The Federal Labeling Requirements

Since petitioner was applying a substantive California labeling requirement which clearly was different than the federal requirement, his purported exercise of concurrent enforcement jurisdiction necessarily cannot be considered "consistent" with the federal labeling requirements. In other words, petitioner's enforcement actions here are preempted because they transgress the threshold restriction embodied in §678 — the prohibition against the states' imposing a labeling requirement different than the federal requirement with respect to a product prepared in a federally inspected establishment. It therefore must follow that petitioner's purported exercise of concurrent jurisdiction under §678 was *inconsistent* with the federal labeling requirements and plainly contravened §678.

Because we believe that the question presented here should be resolved, as it was by the District Court and the Court of Appeals, on the basis of the application of the preemptive language in §678 to the facts of this case, case law would appear to be of little import. However, this case is not the first occasion on which a Court of Appeals (or for that matter this Court) has been called upon to construe and apply §678. The first occasion was in *Armour* v. *Ball*, 468 F.2d 76 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1972), a case which, understandably, petitioner failed to cite in his brief.

In the *Armour* case, plaintiffs, concerns engaged in the preparation of sausage products in federally inspected establishments, brought suit for injunctive and declaratory relief against the enforcement of certain provisions of the Michigan Comminuted Meat Law and regulations promulgated pursuant thereto relative to requirements for the meat byproduct, protein, water and binder content of sausage products, and the labeling of sausage products. In

that action, as here, plaintiffs invoked §678. In reversing the District Court, the Sixth Circuit declared the Michigan requirements unenforceable as "in addition to, or different than" the federal requirements, noting that " . . . in view of its unambiguous language, Section 408 [§678] reflects unequivocal legislative purpose to make the Federal Act preemptive." 468 F.2d at 84. Further, the Court squarely rejected Michigan's argument that the federal requirements were only *minimum* requirements and that the states were free to enact more stringent requirements. While the *Armour* case did not involve weight labeling, the Sixth Circuit's reading of §678 is equally applicable here, as indeed is reflected by the Ninth Circuit's decision here.

CONCLUSION

For the foregoing reasons, and specifically to the end that the intent of Congress to promote uniform national labeling requirements will not be thwarted and that undue burdens not be placed on interstate commerce, the National Independent Meat Packers Association as *amicus curiae* respectfully urges this Court to affirm the judgment of the Court of Appeals for the Ninth Circuit pertaining to The Rath Packing Company.

Respectfully submitted,

EDWIN H. PEWETT
JAMES M. KEFAUVER
GLASSIE, PEWETT, BEEBE & SHANKS
Counsel for the National Independent Meat Packers Association, *Amicus Curiae*

SUPPLEMENTAL APPENDIX

Findings of Fact and Conclusions of Law
In Iowa Beef Processors, Inc., v. Carbaugh,
Civil Action No. 608-74-A
(E.D.Va., November 27, 1974)

FINDINGS OF FACT

The facts in this case are not in dispute, and the Court finds them to be as follows:

Plaintiff, Iowa Beef Processors, Inc., is a corporation engaged in the slaughter of livestock and the sale of meat products in interstate commerce. As such, plaintiff is subject to the provisions of the federal Wholesome Meat Act of 1967 (21 U.S.C. §601, *et seq.*).

Defendant is the Commissioner of the Department of Agriculture and Commerce of the Commonwealth of Virginia. As such, defendant is vested with authority to enforce the provisions of the Virginia Food Act (Va. Code Ann. §3.1-386, *et seq.*) and any regulations promulgated thereunder.

On November 30, 1973, plaintiff obtained from the United States Department of Agriculture final approval[1] of a label to be used on one-pound, three-pound and five-pound packages of a product consisting of beef, water, textured vegetable protein, seasonings, and preservatives (hereafter "the product") bearing the title "Beef and Hydrated Textured Vegetable Protein." The product is in bulk form, i.e., not in the shape of patties or any other

---

[1] A federal regulation provides that no label shall be used on any product manufactured in a federally inspected meat packing establishment until the label has been approved by the Administrator of the Consumer and Marketing Service of the Department of Agriculture. 9 C.F.R. § 317.4 (Revised January 1, 1974).

shape immediately usable by consumers. The label approved by the Department of Agriculture included a depiction, entitled "Serving Suggestion," of one use of the product as patties for barbecue grilling. A legend on the label stated that "Additional uses are Meat Loaf, Meat Balls, Meat Sauces, Casseroles." Subsequent to November 30, 1973, plaintiff shipped the product bearing the aforesaid label to customers in various states, including customers in the Commonwealth of Virginia.

In a letter dated June 7, 1974, an agent of defendant, Mr. Don O'Connell, assistant Supervisor, Food Inspection, advised plaintiff that:

> In reviewing the label of this product, we find that its ingredients are those of a beef pattie mix as defined in the Virginia Ground Beef Regulations. Therefore, the absence of the term "Beef Pattie Mix" on the product's labeling renders it misbranded and in violation of the Virginia Food Laws.

Mr. O'Connell further stated in this letter that "We trust you will take steps to correct this violation and that no further action will be necessary to obtain compliance with the Virginia Food Laws." A copy of this letter was sent to the customer of plaintiff from which defendant's agents had obtained a sample of the product.

In a letter dated July 12, 1974, an agent of defendant, Mr. Ray Vanhuss, Supervisor, Food Inspection, advised plaintiff as follows:

> After serious consideration, it is our judgment that your product meets the Virginia standard of identity for beef patties and should be labeled in compliance with this standard. These regulations and federal regulations specifically establish a standard of identity for this product. Therefore, we do not believe it is within our authority to deviate from these regulations.

> If the product is in bulk form, it should be labeled as "Beef Pattie Mix" with the ingredients listed by the common or usual name in descending order of predominance. If it is shaped in the form of a pattie, it should be labeled as "Beef Patties" followed by a list of ingredients as specified for beef pattie mix.

In subsequent letters to certain of plaintiff's customers in the Commonwealth of Virginia, defendant's agent O'Connell advised these customers that the product was misbranded[2] in violation of the Virginia Food Laws and therefore was subject to seizure.

In a letter dated September 25, 1974, defendant's agent Vanhuss advised plaintiff that:

> Upon very careful evaluation of all the data available to us at this time, we must conclude that the Virginia Food Laws and its regulations are prevailing and that your current labeling is in violation. Consequently, we are advising you that any quantities of beef products under its current label received in this State after October 7, 1974 will be placed under seizure.

The "data available" referred to above included a letter dated September 20, 1974 from Harold M. Carter, Esquire, Director, Regulatory Division, Office of the General Counsel, United States Department of Agriculture, to John Purcell, Esquire, Assistant Attorney General of the Commonwealth of Virgina. The pertinent portions of Mr. Carter's letter are extracted below:

* * *

---

[2] None of the letters directed by defendant's agents to plaintiff or to plaintiff's customers referred to any specific subsection of Section 3.1-396 of the Virginia Code under which defendant deemed the product "misbranded." However, counsel for plaintiff in oral argument indicated that defendant was relying upon subsection 3.1-396(g), the counterpart of 21 U.S.C. § 601(n)(7).

Section 319.15(c) of the meat inspection regulations (9 C.F.R. 319.15(c)) under the Act establishes a standard of composition for products labeled "Beef Patties." The standard provides that beef patties shall consist of chopped fresh and/or frozen beef with or without the addition of beef fat as such and/or seasonings, and does not specify a minimum beef content. These products can contain extenders, binders, and partially defatted beef fatty tissue, without added water or with added water only in amounts such that the product's characteristics are essentially that of a meat pattie.

* * *

. . . . Such products [ground meat with hydrated textured vegetable protein added] if in pattie form, comply with the "beef patties" standard as it does not contain a maximum limit on non-meat ingredients other than added water. However, there is no standard specifically applicable to a beef pattie mix not in pattie form.

* * *

> The Act and the regulations (section 317.2(c)(1)) require a product to be labeled with the name cited in its standard or by a common or usual name in the absence of a specific standard, or if names of this kind do not exist, then a descriptive designation must be used for label identification purposes. The term "Beef and Hydrated Textured Vegetable Protein" was approved by the administrative officials for this purpose.

As a result of the foregoing actions of defendant's agents, plaintiff's customers for the product removed it from display in their stores and refrained from purchasing further supplies of the product. On October 2, 1974, plaintiff commenced this action seeking an injunction prohibiting defendant from seizing, threatening to seize, or otherwise inhibiting the sale of the product in the Commonwealth of

Virginia on the ground that it was misbranded under the Virginia Food Act.

CONCLUSIONS OF LAW

1. The absence of the term "Beef Pattie Mix" on the label of the product does not render the product "misbranded" within the meaning of the federal Wholesome Meat Act of 1967 or the Virginia Food Act inasmuch as the product does not purport to be, nor is it represented as, a product for which a standard of identity or composition has been prescribed by regulation pursuant to either statute. Specfically, the product, although identical in composition to a "Beef Pattie," does not come within the standard for "Beef Patties" prescribed by regulation pursuant to either the federal or the Virginia statute inasmuch as the product's physical characteristics are not "essentially that of a meat pattie" but rather is marketed in bulk form.

2. The Secretary of Agriculture acted in accord with 9 C.F.R. § 317.2(c)(1) in approving, in the absence of a standard of identity or composition applicable to the product, the descriptive title "Beef and Hydrated Textured Vegetable Protein" for the product.

3. By requiring that the label for the product bear the title "Beef Pattie Mix," defendant exceeded his authority in contravention of § 408 of the Wholesome Meat Act (21 U.S.C. § 678) by imposing a marking or labeling requirement "in addition to, or different than" the requirements of the Secretary of Agriculture.

4. This case having been advanced for trial on the merits and consolidated with the hearing on plaintiff's application for preliminary injunction, plaintiff is entitled to a permanent injunction enjoining defendant from seizing, threatening to seize, or otherwise inhibiting the sale of the product in the Commonwealth of Virginia on the ground

that the product should be labeled "Beef Pattie Mix" or "Beef Patties" under the Virginia Food Act. Defendant's motion for summary judgment is denied.

An appropriate Order shall be entered.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
November 27th, 1974